BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

RICHARD FAGUE, Appellant, v. LIQUOR CONTROL BOARD, Respondent.	Case No. DISM-99-0034 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF THE BOARD

I. INTRODUCTION

1.1 **Hearing.** This appeal came on for hearing before the Personnel Appeals Board, WALTER T. HUBBARD, Chair; GERALD L. MORGEN, Vice Chair; and LEANA D. LAMB, Member. The hearing was held on May 2, 3, 4 and 8, 2000, in the Personnel Appeals Board hearing room in Olympia, Washington.

1.2 **Appearances.** Appellant Richard Fague was present and was represented by Wayne Philips, Attorney at Law. Respondent Liquor Control Board was represented by Mark A. Anderson, Assistant Attorney General.

1.3 **Nature of Appeal.** This is an appeal from the disciplinary sanction of dismissal for neglect of duty, insubordination, gross misconduct and willful violation of published Liquor Control Board (LCB) or Department of Personnel rules and regulations. Respondent alleges that Appellant, a Liquor Enforcement Officer 2, brandished a gun while threatening to kill himself in a LCB licensed premise, used threatening and abusive language toward law enforcement officers and an ambulance crew, possessed a weapon in a licensed premise, arranged to meet an underage person in a licensed

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premise, and then, during the investigation of the events, had contact with witnesses contrary to a management directive.

1.4 **Citations Discussed.** WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084 (1983); Countryman v. Dep't of Social and Health Services, PAB No. D94-025 (1995); McCurdy v. Dep't of Social & Health Services, PAB No. D86-119 (1987); Rainwater v. School for the Deaf, PAB No. D89-004 (1989); Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994).

II. FINDINGS OF FACT

2.1 Appellant Richard Fague was a Liquor Enforcement Officer (LEO) 2 and permanent employee of Respondent Liquor Control Board (LCB). Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal on July 9, 1999.

2.2 By letter dated June 14, 1999, Gary Gilbert, Director of the Enforcement and Education Division, informed Appellant of his dismissal effective July 2, 1999. Mr. Gilbert alleged that on December 2, 1998, Appellant was intoxicated, went to the Lipstix tavern to meet with his underage ex-girlfriend and while in the tavern, brandished a weapon and threatened to kill himself. Mr. Gilbert also alleged that Appellant used abusive language toward Pierce County Sheriffs and an ambulance crew and that during the investigation into the incident, Appellant failed to comply with the directive he had been given by management that he was not to contact witnesses to the incident.

2.3 Appellant had been employed with the LCB since 1991. At the time of the actions giving rise to this appeal, Appellant was a LEO 2 for the Southwest Washington Enforcement Division in the Olympia office. Prior to June 1998, Appellant had been assigned to the Tacoma office.

2.4 LEOs enforce liquor and tobacco laws and assist law enforcement and other regulatory agencies regarding violations and providing information on licensees and licensed premises. During the course of their enforcement duties, LEOs rely on the assistance and backup provided to them by other law enforcement agencies. The work hours of LEOs vary and they may be required to work nights or weekends and irregular or extended periods of time.

2.5 In March 1997, Appellant suffered a heart attack. When he returned to work following a his heart attack, Appellant was placed on light duty in accordance with his physician's instructions. In June 1997, Appellant was diagnosed with depression and was prescribed anti-depressant medication.

2.6 In June 1998, Appellant voluntarily transferred to the Olympia office. In July or August of 1998, he informed his supervisor, Tim Thompson, that he was being treated for depression and indicated that he did not require further assistance from the agency. Appellant did not request an accommodation for his medical condition. However, he did inform the agency of his condition and of his need to take medication.

2.7 In November 1998, the Olympia office began conducting tobacco enforcement operations. Appellant was assigned to the team that was conducting a surveillance in Clark County. The surveillance was expected to last one to two days but it actually lasted four days. When Appellant packed his personal items for the surveillance, he did not include a four day supply of his depression medication. Appellant ran out of medication during the surveillance and was unable to procure more before the conclusion of the operation.

2.8 After the conclusion of the Clark County surveillance, Appellant informed his supervisor that he needed some time off. Appellant's request for time off was granted and on December 2,

1998, Appellant began vacation leave. Also on December 2, 1998, Appellant had a court appearance regarding a no-contact order he had filed against his underage ex-girlfriend and a counter no-contact order that his underage ex-girlfriend had filed against on him.

2.9 Following his court appearance on December 2, 1998, Appellant consumed alcohol and eventually went to the Lipstix tavern in Lakewood, Washington. The tavern was previously in Appellant's assigned work area.

2.10 Appellant arrived at the tavern between approximately 6:00 and 6:30 p.m. The owner, Ali Mehdizadehkashi, was a friend of Appellant's and he and Appellant went into the office of the tavern. Mr. Mehdizadehkashi felt that Appellant was distressed and drunk. He demanded that Appellant surrender his car keys to him. After obtaining the keys, Mr. Mehdizadehkashi procured Appellant's handgun from Appellant's car and placed it in the office desk drawer. Mr. Mehdizadehkashi left the office to get some coffee for Appellant and when he returned, Appellant had the gun and was threatening to kill himself. After approximately two hours of trying to gain control the situation with Appellant, Mr. Mehdizadehkashi called emergency personnel at 911.

2.11 Appellant was uncooperative and he threatened and directed profanity at the Pierce County Sheriffs who responded to the call. Eventually, Appellant was placed in handcuffs and taken to the hospital by ambulance. During the ride to the hospital, Appellant was hostile toward the ambulance crew. After Appellant arrived at the hospital, LCB personnel were informed of the incident.

2.12 By letter dated December 7, 1998, Rex Prout, Assistant Chief of Field Operations, informed Appellant that the agency was investigating of his actions on the evening of December 2 -3, 1998. Mr. Prout directed Appellant to have no contact with witnesses to the incident until the

investigation was completed. Appellant was told that if he had any questions about the directive, he was to contact Agent in Charge, Mike Burke.

2.13 Mr. Prout assigned the investigation to R.W. Donahue, Tacoma Agent in Charge. By memorandum dated December 15, 1998, Mr. Donahue provided his report to Gary Gilbert, Chief of Enforcement and Education. Sometime before December 27, 1998, Tim Thompson told Appellant that Mr. Donahue had completed his investigation.

2.14 Subsequently, Mr. Prout conducted a follow up investigation. On January 6, 1999, Mr. Prout talked to Appellant's ex-girlfriend and learned that Appellant had contacted her on January 5, 1999.

2.15 On February 21, 1999, LCB employees Cole Roberts and Karen Patrick saw Appellant's car in the parking lot of the Lipstix tavern. They entered the establishment and found Appellant in the office playing cards with at least two witnesses to the December 2, 1998 incident. Mr. Roberts and Ms. Patrick reported their observation to Mr. Prout on February 23, 1999.

2.16 In early January 1999, Mr. Gilbert placed Appellant on administrative leave. Appellant remained on administrative leave until his termination.

2.17 The formal LCB investigation was concluded on March 4, 1999, when Appellant was provided a pre-termination letter. A pre-termination meeting was scheduled and Appellant was provided an opportunity to respond to the charges. Appellant provided a written response by letter dated May 20, 1999.

2.18 After considering all the available information, including Appellant's response to the charges, Mr. Gilbert concluded that misconduct had occurred. Because the misconduct occurred in an LCB licensed establishment where officers were responsible for enforcing liquor laws, Mr. Gilbert concluded that a nexus existed between Appellant's conduct and his employment and that his conduct had a detrimental effect on the agency's ability to carry out its goals and mission. Mr. Gilbert also concluded that Appellant's conduct undermined Appellant's credibility and trustworthiness with LCB employees and members of other law enforcement agencies and had an adverse effect on his ability to carry out the duties of his position.

2.19 Mr. Gilbert determined that Appellant went to the tavern to meet his ex-girlfriend and her boyfriend which was a violation of RCW 66.44.310. RCW 66.44.310 prohibits serving or allowing persons under the age of twenty-one to remain in off-limits areas of licensed establishments. Mr. Gilbert also determined that Appellant violated RCW 9.41.300 when he possessed a weapon in a LCB licensed establishment.

2.20 Mr. Gilbert also concluded that Appellant neglected his duty to conduct himself in an ethical and professional manner; failed to comply with Chapter 1, Fd, F3g and F3I of the LCB Enforcement Manual which requires officers to cooperate with other enforcement agencies, to refrain from the use of profane, abusive and threatening language, and to conduct themselves while off duty in an exemplary manner so as to avoid criticism. In addition, Mr. Gilbert determined that Appellant's behavior rose to the level of gross misconduct and that his action of contacting witnesses during the investigation constituted insubordination.

2.21 Mr. Gilbert felt that Appellant was a threat to himself and others, that the trust and credibility the agency had placed in Appellant had ceased to exist, and that termination was the appropriate sanction.

III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues that Appellant did not request reasonable accommodation, rather he indicated that he did not need further help from the agency. Therefore, Respondent contends that the agency had no reason to believe that Appellant was in need of accommodation. Respondent further argues that to facilitate and maintain the legitimacy of the investigation, it was appropriate to limit Appellant's contact with witnesses during the investigation process. Respondent asserts that Appellant committed misconduct of the most egregious kind, violated agency policy, failed to exercise good judgment, and violated his duty to be truthful, to obey his superiors and to use appropriate discretion. Respondent contends that there is a nexus between Appellant's off-duty conduct and his employment as an LEO and asserts that Appellant's off-duty conduct had an adverse effect on the agency's mission and destroyed all trust between Appellant and the LCB, the Pierce County Sheriffs office and the police. Respondent further contends that termination was the appropriate disciplinary sanction and that the appeal should be denied

3.2 Appellant argues that he informed the agency of his mental health problems and his need for help, yet the agency did nothing. Appellant asserts that on-the job stress, his irregular work schedule, and his inability to procure medication during the Clark County surveillance exacerbated his mental health problems and contributed to his breakdown on December 2. Appellant further argues that the agency violated his fundamental right to free speech when it attempted to prohibit him from speaking to witnesses of the December 2, 1998 incident. Furthermore, Appellant contends that he was not insubordinate because the investigation was completed by December 16 when Mr. Donahue issued his report. Therefore, Appellant argues that the agency had no reason to restrict his contacts with witnesses after December 16. Appellant asserts that he did not neglect his duty because the agency failed to prove that his off-duty conduct was detrimental to the goals and mission of the agency or that there was a nexus between his conduct and his duties as a LEO. Appellant also asserts that Respondent failed to prove that his actions violated agency policy or rose

to the level of gross misconduct because his behavior on December 2 was the result of a chemical imbalance, exacerbated by the extended surveillance in Clark County, and was not deliberate or flagrant. Regarding the alleged violations of the RCW, Appellant argues that on December 2, 1998, he was never in an off-limits area of the tavern with his ex-girlfriend and he did not enter the premises with a handgun. Appellant contends that Respondent failed to meet its burden of proof and that termination of an eight-year employee with an unblemished record was not an appropriate sanction. Appellant requests that following a fitness for duty evaluation he be reinstated to his position and be allowed an opportunity to prove himself an asset to the agency and capable of performing the duties of his position.

IV. CONCLUSIONS OF LAW

4.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter herein.

4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting the charges upon which the action was initiated by proving by a preponderance of the credible evidence that Appellant committed the offenses set forth in the disciplinary letter and that the sanction was appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084 (1983).

4.3 In Maxwell v. Dep't of Corrections, 91 Wn. App. 171, 956 P.2d 1110 (1998), appellant Maxwell, a diabetic and manic depressive, asserted that the Board should excuse his admitted misconduct because it was caused by his medical condition. The Court of Appeals upheld the Board's ruling that without evidence that appellant Maxwell's condition caused his behavior, he could not show he was disciplined because of his condition or discriminated against because of his condition. The Court also stated that an employer's duty to accommodate does not arise "unless

there is a need for accommodation." The court, quoting from Goodman v. Boeing Co., 127 Wn.2d 408, P.2d 1265 (1995), states that "the employee, of course, retains a duty to cooperate with the employer's efforts by explaining her disability and qualifications. . . . . Reasonable accommodation thus envisions an exchange between employer and employee where each seeks and shares information to achieve the best match between the employee's capabilities and available position."

4.4 In West v. Dep't of Corrections, PAB No. DISM-97-0016 (1998), the Board concluded that because appellant West did not make her employer aware of her need for accommodation until after her admitted misconduct was discovered, the employer was under no obligation to accommodate her disability at the time of her misconduct.

4.5 In the case presented here, Appellant raised the issue of his disability and his need for reasonable accommodation as a defense. Appellant did not request accommodation for his mental condition. Respondent had previously accommodated Appellant's request for light duty following his heart attack. Therefore, Appellant knew how to request an accommodation if necessary. However, rather than request accommodation, Appellant informed his supervisors of his need to take anti-depressants and stated that he needed no further assistance from the agency. Under the proven facts of this case, Respondent did not fail to accommodate Appellant's mental condition.

4.6 Respondent has proven the required nexus between Appellant's off-duty conduct in a LCB licensed premise and his continued ability to effectively perform the duties of an LEO 2. The record in this case clearly shows that Appellant's off-duty conduct adversely effected his ability to interact in a credible and trustworthy manner with local law enforcement agencies and other LCB officers.

4.7 Neglect of duty is established when it is shown that an employee has a duty to his or her employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep't of Social & Health Services, PAB No. D86-119 (1987).

4.8 Respondent met its burden of proving that Appellant neglected his duty when, on December 2, 1998, he used profane, abusive and threatening language to law enforcement officers. Appellant's actions brought negative attention to the agency and violated the agency's ethical standards. Furthermore, Appellant provided no medical evidence or testimony to support his claim that his actions were attributable to a medical condition. Therefore, based on a preponderance of the credible testimony and evidence, we conclude that Appellant's actions constituted a neglect of duty.

4.9 Insubordination is the refusal to comply with a lawful order or directive given by a superior and is defined as not submitting to authority, willful disrespect or disobedience. Countryman v. Dep't of Social and Health Services, PAB No. D94-025 (1995).

4.10 Respondent failed to prove that Appellant was insubordinate when he had contact with witnesses before the conclusion of the investigation. We understand the agency's concerns with preserving the integrity of the investigation process. However, agencies must use caution when issuing directives that unduly limit an employee's off duty actions. In addition, the agency provided no evidence of a policy or procedure for conducting investigations. Such a policy would provide guidance to investigators and to employees under investigation as to what was expected during the investigation process. Furthermore, we find no evidence of harm caused by Appellant playing cards with witnesses to the December 2 incident, particularly in light of the fact that the initial investigation into the incident had concluded and the statements of the witnesses had been preserved.

4.11 Gross misconduct is flagrant misbehavior which adversely affects the agency's ability to carry out its functions. Rainwater v. School for the Deaf, PAB No. D89-004 (1989).

4.12 Respondent met its burden of proving that Appellant's actions rose to the level of gross misconduct. Appellant's behavior endangered himself and others and irreparable damage his credibility with LCB staff and with local law enforcement agencies. Furthermore, Appellant's actions violated the trust the agency had placed in him. Appellant's actions clearly had a detrimental effect on the agency and terminally harmed the relationship that existed between Appellant, his co-workers and other law enforcement agencies.

4.13 Willful violation of published employing agency or institution or Personnel Resources Board rules or regulations is established by facts showing the existence and publication of the rules or regulations, Appellant's knowledge of the rules or regulations, and failure to comply with the rules or regulations. A willful violation presumes a deliberate act. Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994).

4.14 Respondent met its burden of proving that on December 2, 1998, Appellant failed to cooperate with the Pierce County Sheriffs officers; used profane, abusive and threatening language; and failed to conduct himself in an exemplary manner. Appellant was aware of the requirements of the LCB Enforcement Manual, yet he failed to comply. Furthermore, Respondent established that Appellant violated RCW 9.41.300. When Appellant took possession of a weapon in the office of Lipstix tavern, he knowingly had the weapon under his control which was a violation of RCW 9.41.300. Respondent failed to prove that Appellant violated RCW 66.44.310. While Appellant may have intended to meet his underage ex-girlfriend at the tavern, intent does not constitute a

violation of the statute. Furthermore, nothing in the record shows that Appellant allowed his underage ex-girlfriend to be served or to remain in the off-limits area of the tavern.

4.15 In determining whether a sanction imposed is appropriate, consideration must be given to the facts and circumstances including the seriousness and circumstances of the offense. The penalty should not be disturbed unless it is too severe. The sanction imposed should be sufficient to prevent recurrence, to deter others from similar misconduct, and to maintain the integrity of the program. An action does not necessarily fail if one charge is not sustained unless the entire action depends on the unproven charge. Holladay v. Dep't of Veteran's Affairs, PAB No. D91-084 (1992).

4.16 Respondent has met its burden of proving that under the totality of the proven facts and circumstances, Appellant neglected his duty, that his actions rose to the level of gross misconduct, and that he knowingly violated published agency policies and RCW 9.41.300. Therefore, based on a preponderance of the credible evidence, the sanction of dismissal should be affirmed and the appeal of Richard Fague should be denied.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Richard Fague is denied.

DATED this _____ day of _____, 2000.

WASHINGTON STATE PERSONNEL APPEALS BOARD

_____
Walter T. Hubbard, Chair

_____
Gerald L. Morgen, Vice Chair

_____
Leana D. Lamb, Member

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